

June 2006

## 2006 Judges' Edition Bench Memorandum: Eighteenth Annual Pace National Environmental Law Moot Court Competition

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### Recommended Citation

Erin Flanagan, *2006 Judges' Edition Bench Memorandum: Eighteenth Annual Pace National Environmental Law Moot Court Competition*, 23 Pace Env'tl. L. Rev. 491 (2006)  
Available at: <http://digitalcommons.pace.edu/pelr/vol23/iss2/7>

**EIGHTEENTH ANNUAL  
PACE NATIONAL ENVIRONMENTAL LAW  
MOOT COURT COMPETITION**

**2006 Judges' Edition Bench Memorandum\***

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**IN THE UNITED STATES  
COURT OF APPEALS FOR THE TWELFTH CIRCUIT**

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**Civ. App. No. 05-195**

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**BEARCLAW RIVER KEEPER, INC.,  
Appellant**

**and**

**TOWN OF NOBLESVILLE, NEW UNION,  
Appellant / Appellee**

**v.**

**MAJOR ELECTRONICS, INC.  
Appellee**

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**ON APPEAL FROM THE  
UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF PROGRESS**

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\* This is a lightly edited version of the document provided to the judges of the Pace National Environmental Law Moot Court Competition. Special thanks to Pace Environmental Law Review members Sarah Olinger and Jennie Nolon for their editing.

## SECTION I: EXECUTIVE SUMMARY

This appeal involves six issues relating to the jurisdiction of the Federal Water Pollution Control Act, commonly known as the Clean Water Act ("Clean Water Act," "CWA," or "Act"), CWA §§ 101-606, 33 U.S.C. §§ 1251-1387 (2000), and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), CERCLA §§ 101-405, 42 U.S.C. §§ 9601-9675 (2000).

The first issue is whether contaminated soil beneath a manufacturing facility is a "point source" under the Act, CWA § 502(14), 33 U.S.C. § 1362(14), and, therefore subject to National Pollutant Discharge Elimination System ("NPDES") permit requirements, CWA § 402, 33 U.S.C. § 1342. The second issue addresses whether the alleged discharge of pollutants into navigable waters in violation of existing state water quality standards is actionable under the Clean Water Act. CWA §§ 301(a), 505(a)(1), 33 U.S.C. §§ 1311(a), 1365(a)(1). Issues three, four, and five ask whether the CWA preempts actions sounding in federal and state common law nuisance. The sixth issue addresses whether claims for reimbursement and summary judgment under CERCLA § 113(f), 42 U.S.C. § 9613(f), can stand in the absence of a pending or previous action under CERCLA § 107, 42 U.S.C. § 9607, and where one of the claimants is also a party to the action.

In response to public outcry over the degradation of the country's waters, Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). The responsibility for enforcing the Act's requirements is shared between the federal and state governments. The United States Environmental Protection Agency ("EPA") has the responsibility of administering the statute, CWA § 101(d), 33 U.S.C. § 1251(d), but must do so in cooperation with "State and local agencies" in a manner that develops "comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." CWA § 101(g), 33 U.S.C. § 1251(g). With the CWA, Congress provided "recognition, preservation, and protection of [the] primary responsibilities and rights of States . . . to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources" in consultation with the EPA. CWA § 101(b), 33 U.S.C. § 1251(b). The public also plays a meaningful

role in the CWA, both through “public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program” established by the EPA or the states, CWA § 101(e), 33 U.S.C. § 1251(e), as well as through its ability to bring “citizen suits” against alleged polluters, CWA § 505, 33 U.S.C. § 1365.

The NPDES permitting system is the “centerpiece of the Clean Water Act.” *E.g., Friends of the Earth, Inc. v. Gaston Copper Recycling, Inc.*, 204 F.3d 149, 151 (4th Cir. 2000).

Congress established the NPDES permitting system within the Act to control the discharge of pollutants into the nation’s waters. CWA § 301(a), 33 U.S.C. § 1311(a). The basic prohibition of the NPDES is of the addition of a pollutant from a point source into navigable waters without a permit. CWA § 402, 33 U.S.C. § 1342. Either the EPA, or a qualifying state regulatory entity issues NPDES permits or their state equivalents, commonly known as State Pollutant Discharge Elimination System (“SPDES”) permits. CWA §§ 402(a), (b), 33 U.S.C. §§ 1342(a), (b). Before the designated regulator can issue an NPDES or SPDES permit, the Act requires that the applicant receive certification from the state in which the affected water body is located. CWA § 401, 33 U.S.C. § 1341. A state will grant an applicant certification only when the proposed permit complies with specific state criteria. *Id.* The Act also requires that states inventory and classify their water bodies according to specified categories of “use” criteria. *See* CWA § 303, 33 U.S.C. § 1313. States must then develop water quality standards that consist of designated uses for the water bodies and water quality criteria that support the designated uses. *Id.* Finally, the Act requires that the designated regulator incorporate effluent limitations based on these water quality standards into the NPDES or SPDES permits. CWA §§ 301, 402, 33 U.S.C. §§ 1311, 1342. In summary, the Clean Water Act establishes a comprehensive program to control point source pollution through the shared authority of federal and state regulators.

CERCLA, 42 U.S.C. §§ 9601-9675, commonly known as Superfund, was enacted by Congress on December 11, 1980. CERCLA created a tax on the chemical and petroleum industries and provided broad federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. In general, CERCLA allows the government to bring cost-recovery actions against potentially responsible parties (“PRPs”) for the clean-up of designated contami-

nation sites. See CERCLA § 106, 42 U.S.C. § 9606. In addition, the statute allows PRPs to bring suit against each other, either in contribution or in a cost recovery action for the reimbursement of expenses incurred during a removal or remediation activity. See CERCLA §§ 107, 113(f), 42 U.S.C. §§ 9607, 9613(f).

Section II of this memorandum presents the facts and procedural history of this case. Section III discusses the facts and law relating to these six issues. Each count is posed in terms of an "issue question": The issue's underlying facts are presented, the positions of the parties are discussed, the pertinent statutory and case law is cited, and each party's argument is set forth. This memorandum does not suggest conclusions as to the appropriate outcome on each issue; instead, such conclusions are left to the strength of the parties' oral arguments and the discretion of each judge.

## SECTION II: THE FACTS AND PROCEDURAL HISTORY

### A. The Facts

This is a citizen suit brought by a local environmental advocacy group, Bearclaw Riverkeeper, Inc. ("Appellant-BRK") and a municipality, Noblesville, in the state of New Union ("Appellant-Noblesville") against Major Electronics, Inc. ("Appellee"), a for-profit corporation organized under the laws of and doing business in Fort Union, in the state of Progress. The Appellants charge that Appellee is violating the Clean Water Act by discharging polychlorinated biphenyls ("PCBs") from the soil beneath Appellee's Fort Union manufacturing plant, thereby contaminating the Bearclaw River, the Noblesville public beach, and the fish and other aquatic life in the river. The Appellants have also brought claims under CERCLA seeking reimbursement from Appellee of recovery or response costs related to the cleanup of the beach and the river.

The uncontroverted facts are as follows. For decades, Appellee has manufactured electrical equipment at its facility located in Fort Union, Progress. Appellee has an NPDES permit issued by the EPA under CWA § 402, 33 U.S.C. § 1342, which allows it to discharge treated effluent from its manufacturing process lines into the Bearclaw River. Until 1980, Appellee used PCBs as heat-resistant conduction material in the manufacture of many of its products. In 1980, Appellee stopped using PCBs in its production

process. PCBs were never a normal part of the wastewater discharge from Appellee's production process, although Appellee's wastewater discharge was contaminated, from time to time, with incidental concentrations of PCBs from unknown origins. When Appellee applied for its initial NPDES permit and subsequently renewed its permit, Appellee reported occasional low-level concentrations of PCBs in its wastewater discharge. The issuing authority did not include a PCB effluent limitation in Appellee's NPDES permit. All measurements of PCBs in Appellee's wastewater effluent have been less than the amounts reported in its initial NPDES permit application and subsequent permit renewals.

Over the years, spills and equipment leaks of PCBs at Appellee's Fort Union manufacturing facility have impregnated the soil beneath the facility with PCBs. Appellee's manufacturing facility is located on the banks of the Bearclaw River. The water table beneath Appellee's manufacturing facility is located up-gradient from the Bearclaw River. As a result, when it rains, precipitation soaks into the soil and flows through the soil and groundwater to the Bearclaw River, carrying with it concentrations of PCBs and soil particles, which then enter the river.

The Bearclaw River flows across the state boundary from Progress into New Union at a point that is one mile downstream from Appellee's manufacturing facility. The town of Noblesville is located one mile downstream from the state boundary. The Noblesville public beach and Appellee's manufacturing facility are situated on the same side of the river. Over the years, PCBs have migrated from the soil beneath Appellee's manufacturing facility to the Noblesville public beach where they have contaminated the soil on the banks, the public beach, and the sediment in the river itself.

Progress environmental regulators have classified a several-mile reach of the Bearclaw River starting upstream of Appellee's manufacturing facility and running to the state line as "Class C" waters. "Class C" waters are suitable for industrial and non-contact recreational use. Progress does not have water quality standards for PCBs in "Class C" waters. New Union has classified a fifty-mile reach of the Bearclaw River starting at the state line and continuing downstream through and past Noblesville as "Class B" waters. "Class B" waters are suitable for fishing and contact recreational use. New Union has water quality standards of amount X for PCBs in "Class B" waters. Following wet weather events, concentrations of PCBs in the Bearclaw River downstream

from Appellee's manufacturing facility and adjacent to the Noblesville public beach exceed amount X. The only known sources of PCBs in this section of the Bearclaw River are the soil beneath Appellee's manufacturing facility and the Noblesville public beach.

Eighty percent of Appellant-Noblesville's population is Proto-Litigian, which is the largest percentage of this minority group that resides in any town located in New Union. Overall, approximately twenty percent of the State's residents are of Proto-Litigian descent. On average, Appellant-Noblesville's population is just above the poverty level. Appellant-Noblesville is the poorest town in the State. The town does not have a municipal swimming pool and, consequently, its residents rely on the Bearclaw River public beach as a recreation destination. The New Union Department of Environmental Conservation ("NUDEC") has warned the residents of Noblesville that using the public beach and swimming in the Bearclaw River may expose them to unsafe levels of PCBs. In addition, many Noblesville residents engage in sustenance fishing on the Bearclaw River. Most fishing occurs from old pilings on or near the public beach. A survey conducted by NUDEC concluded that the average resident of Noblesville annually consumes twelve pounds of fish from the Bearclaw River. Fish taken from the Bearclaw River at locations on or near the public beach contain levels of PCBs that exceed safety levels established by the Federal Food and Drug Administration ("FDA"). NUDEC and FDA both have issued repeated public warnings against eating fish from the Bearclaw River. The surveys conducted by NUDEC, however, demonstrate that these warnings did not result in a diminution of local consumption of fish from the river.

In the spring of 2005, Appellant-Noblesville spent \$50,000 to construct an eight-foot high chain link fence to prevent access to the public beach and increase policing of the area to prevent swimming and fishing in the Bearclaw River. Appellant-BRK spent \$500 on signs that it posted on the fence, which warned against the dangers of the PCBs in the river and on the public beach. Although residents continue to swim and fish in other portions of the Bearclaw River, a 2005 NUDEC survey showed that local swimming in the Bearclaw River and fish consumption decreased 30 percent and 25 percent, respectively, from the previous summer.

## B. Procedural History

After completing discovery, the parties filed cross-motions for summary judgment in the United States District Court for the District of New Union. The District Court granted Major Electronic, Inc.'s motion for summary judgment and denied those of Bearclaw Riverkeeper, Inc. and the Town of Noblesville. The District Court's determination is the subject of this appeal by Appellant-BRK and Appellant-Noblesville.

Appellant-BRK brings five Clean Water Act claims against Appellee, as well as a related CERCLA action. In Count I, Appellant-BRK alleges that Appellee is in violation of CWA § 301(a), 33 U.S.C. § 1311(a), for the discharge of pollutants from its PCB-laden soil into the Bearclaw River without an NPDES permit issued under CWA § 402, 33 U.S.C. § 1342. In Count II, Appellant-BRK alleges that Appellee's discharge of PCBs exceeds water quality standards established by the state under CWA § 303, 33 U.S.C. § 1313. In Counts III, IV, and V, Appellant-BRK alleges that Appellee is violating the federal and state common law of nuisance by polluting interstate waters that its members and the public use. In Count VI, Appellant-BRK seeks reimbursement for the \$500 it spent on signage warning the residents of Noblesville of the dangers of the PCBs on the public beach, in the Bearclaw River, and in the fish and other aquatic life in the river. As relief, Appellant-BRK seeks an immediate and mandatory injunction against further violations of the Clean Water Act by Appellee and the assessment of civil penalties for each day of such violation. Appellant-BRK also seeks to enjoin Appellee from continuing its activities that give rise to nuisance under federal and state common law.

Appellant-Noblesville has sought and was granted permissive intervention to join Appellant-BRK in Counts II through V. Appellant-Noblesville has also added a claim for reimbursement of \$50,000 in response costs, spent to construct the chain-link fence and increase policing at the Noblesville public beach, under CERCLA § 107, 42 U.S.C. § 9607, (Count VI). As relief, Appellant-Noblesville requests a declaratory judgment against Appellee for all of Appellant-Noblesville's future costs of removing PCBs from its public beach and the adjacent bed of the Bearclaw River.



## SECTION III:

## COUNT I:

Whether PCB-contaminated Soil at Appellee's Manufacturing Facility Is a "Point Source" Under CWA § 502(14),  
33 U.S.C. § 1362(14).

## A. Facts

Over time, the soil beneath the Appellee's manufacturing facility in Fort Union, Progress has become contaminated with PCBs. Following wet weather events, these PCBs percolate through the soil and are carried by groundwater to the Bearclaw River. The river carries the PCBs approximately one mile from Fort Union, Progress, to Noblesville, New Union. The PCBs have contaminated the soil on the banks of the Bearclaw River in New Union, the Noblesville public beach, and the sediment of the river itself.

Appellee does not dispute that New Union's water quality standards for PCBs are violated after wet weather events or that these violations are caused, largely, if not entirely, by Appellee's PCBs.

## B. Positions of the Parties

Appellee claims that the PCB-contaminated soil beneath its manufacturing facility is not a "point source" as defined by the Clean Water Act. Appellee relies on the legislative history and statutory language of the Act to argue that the PCB-contaminated soil beneath its manufacturing facility is not a "point source." Appellee also relies on decisions that indicate that a "point source" must be a "discernible, confined and discrete conveyance," and that soil is not such a "conveyance." If the PCB-contaminated soil is not a "point source" under the Act, then the leaching of the PCBs from Appellee's soil into the Bearclaw River is not a "discharge" prohibited by the Act.

Appellant-BRK maintains that the PCB-contaminated soil is a "point source," and has presented evidence that the vadose zone beneath Appellee's manufacturing facility is contaminated with PCBs at depths that reach the water table. PCB-laden groundwater flows from beneath Appellee's manufacturing facility to the Bearclaw River. Because there is no source of PCBs other than Appellee's manufacturing facility and because these PCBs are being conducted through Appellee's soil into the Bearclaw River, Ap-

pellant-BRK maintains that the contaminated soil is a “point source.” Appellee does not dispute that its manufacturing facility is the source of the PCBs or that the PCBs are reaching the Bear-claw River. Like the Appellee, Appellant-BRK relies on the legislative history and language of the Act to support its argument. Appellant-BRK also relies on decisions that have held that natural systems, which have been altered by humans, are “point sources” and are jurisdictional under the Act.

Appellant-Noblesville is not a party to this issue.

### C. Law

#### 1. The Statute

In its passage of the Clean Water Act in 1972, Congress reflected the country’s growing awareness of ecology as a body of scientific study, stating, “[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.” S. Rep. No. 92-414, at 77 (1972). Congress also recognized that pollutants enter the hydrologic cycle through both point and nonpoint sources of pollution. However, although Congress recognized the ecology of pollution, it limited the scope of the CWA to the regulation of “any discernible, confined and discrete conveyance” capable of the “discharge of a pollutant.” See CWA §§ 502(6), 301(a), 33 U.S.C. §§ 1362(6), 1311(a).

The basic prohibition of the Clean Water Act is the “discharge of any pollutant by any person” without an appropriate permit. See CWA § 301(a), 33 U.S.C. § 1311(a). The Act defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.” CWA § 502(12), 33 U.S.C. § 1362(12). A “point source” is

any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

CWA § 502(14), 33 U.S.C. § 1362(14).

Point sources are regulated through NPDES permits. CWA § 301(a), 33 U.S.C. § 1311(a). NPDES permits are issued by either the EPA or a state with an approved program. *Id.* See also

CWA §§ 402(a), (b), 33 U.S.C. §§ 1342(a), (b). When a state issues a permit, it is generally referred to as an SPDES permit. Both NPDES and SPDES permits contain effluent limitations and water quality standards that the point source discharger must maintain in order to stay within the confines of the Clean Water Act. *See* CWA §§ 301(b)(1)(A), (C), 303, 304, 33 U.S.C. §§ 1311(b)(1)(A), (C), 1313, 1314.

The Clean Water Act differentiates between "point source" pollution, which it regulates, and "nonpoint source" pollution, which it does not. Section 101(a)(7) of the Act, 33 U.S.C. § 1251(a)(7) provides that "it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of [the Act] to be met." The Clean Water Act instructs the EPA to develop "(1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution" from an enumerated set of activities that were exclusively defined as "nonpoint sources of pollution." CWA § 304(f), 33 U.S.C. § 1314(f). In a section entitled "Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution," the Clean Water Act provides a list of nonpoint sources of pollution, including:

- (A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands;
- (B) mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines;
- (C) all construction activity, including runoff from the facilities resulting from such construction;
- (D) the disposal of pollutants in wells or in subsurface excavations;
- (E) salt water intrusion resulting from reductions of fresh water flow from any cause, including extraction of ground water, irrigation, obstruction, and diversion; and
- (F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

CWA § 304(f)(2)(A)-(F), 33 U.S.C. § 1314(f)(2)(A)-(F).

The legislative history also makes clear that nonpoint sources of pollution are limited to runoff that, following wet weather

events, carries pollutants over the soil's surface and into navigable waters. The legislative history indicates that Congress intended to classify nonpoint source pollution as runoff caused primarily by rainfall around those types of activities that employ or cause pollutants. This is illustrated by the Senate Report discussion of what became CWA § 304, 33 U.S.C. § 1314:

Sediment, often associated with agricultural activities, is by volume our major pollutant, not only from the degrading effect of the sediment, but because it also transports other pollutants. Fertilizer and pesticide runoff are also major agricultural nonpoint sources. Poor forestry practices, including indiscriminate clear cutting, may also generate substantial soil erosion problems . . . .

One of the common problems associated with pollution control is the dramatic increase in storm runoff when the earth's surface is made impermeable. Thus highways, building, and parking lots all contribute substantially to the accelerated runoff of rainwater into natural water systems. The greater volume and greater velocity produced high rates of erosion and siltation. In addition, highway runoff often includes oil, rubber particles, lead, asbestos and other elements or additives deposited on highways as a result of vehicular traffic.

S. Rep. No. 92-414, at 52 (1972), *reprinted in Legislative History of the Federal Water Pollution Control Act Amendments of 1972*, at 530-35 (1973).

In 1987, Congress added section 319 to the Clean Water Act, 33 U.S.C. § 1329, providing a mechanism for states, territories, and Indian tribes to receive federal grants as support for a variety of activities taken at the state and local level to address nonpoint source pollution. This section required states to address nonpoint source pollution by conducting statewide assessments of their waters. These assessments purported to identify those waters that do not fully support state water quality standards because of nonpoint source pollution. *See* CWA § 319(a)(1)(A), 33 U.S.C. § 1329(a)(1)(A). The new section also required states to develop nonpoint source management programs to address the impaired or threatened waters identified in nonpoint source assessments. *See* CWA § 319(b), 33 U.S.C. § 1329(b). After the EPA approval, states were required to implement these nonpoint source management programs over a multi-year time frame. *See* CWA § 319, 33 U.S.C. § 1329.

From time to time, the EPA issues regulations that define and clarify the regulated "point source" activities included in CWA § 304(f) and gives examples of "nonpoint sources." Generally, some agricultural and silvicultural activities are to be regulated as part of a state's SPDES program. *See, e.g.*, 40 C.F.R. § 122.23 (2005) (concentrated animal feeding operations); 40 C.F.R. § 122.24 (concentrated aquatic animal production facilities); 40 C.F.R. § 122.25 (aquaculture projects); 40 C.F.R. § 122.26 (stormwater discharges); 40 C.F.R. § 122.27 (silviculture). The EPA also defines specific "point source" categories that are regulated under the NPDES program as part of the activities listed in CWA § 304(f). *See, e.g.*, 40 C.F.R. pts. 405-471.

## 2. Judicial Interpretation

Courts have read the Clean Water Act broadly and recognized that a regulated "point source" may include natural as well as manmade elements, which together discharge pollutants into regulated waters. *See, e.g., Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (finding as "point sources" those conveyances of pollution formed either as a result of natural means or human activity on the land). Courts have also stressed that, although the definition of "point source" is important, "Congress has placed liability with those in control of the pollutants being discharged," regardless of the "point" at which the pollutants enter regulated waters. *See, e.g., Friends of the Sakonnet v. Dutra*, 738 F. Supp. 623, 629 (D.R.I. 1990) (quoting *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979)) (noting that focusing only on the statutory definition of "point source" isolates "one subsection from the rest of a law that was written broadly to reach to the fullest extent possible those sources emitting pollution into rivers, streams and lakes").

In *Abston*, the Fifth Circuit addressed the issue of whether a "point source" existed in the absence of any "direct action" undertaken by the defendant-mine operators, where runoff from their strip mines contaminated a nearby water body. The District Court for the Northern District of Alabama determined by summary judgment that there was no violation of the Clean Water Act because there was no "point source" where a coal mining operation's sediment basin overflow and erosion of piles of discarded material resulted in rainwater carrying pollutants into a navigable body of water. *Abston*, 620 F.2d at 43. The District Court found that any pollutants that were deposited in the water body

were “carried by natural forces, mostly erosion caused by rainwater runoff” rather than “from any affirmative act of discharge by the defendants.” *Id.* at 43-44 (citations omitted). The Fifth Circuit found that the District Court interpreted the statutory definition of “point source” too narrowly, reversed the lower court’s decision, and remanded the case for further proceedings. *Id.* at 43, 46.

The defendants in the case operated strip coal mines near Daniel Creek, a tributary of the Black Warrior River, in Tuscaloosa County, Alabama. *Id.* at 43. Defendants’ coal mining activities resulted in the creation of “spoil piles” of excavated soil and drainage basins that it constructed to catch sediment flowing down the outer edges of the spoil piles. *Id.* at 46. There was testimony in the plaintiff’s affidavits and depositions that “dirt, sand, and other solid particles were transported from the spoil banks by rainwater to Daniel Creek.” *Id.* A witness for the defense testified that in some areas, drainage basins were constructed along a “drainage course” and that, following a precipitation event, “water and small amounts of sediment would drain through the sediment basin outflow.” *Id.* The president for the defendant company also noted that “gullies would carry water and sediment toward the creek.” *Id.* Other evidence showed that rainwater trapped in the mine pits themselves also “eventually percolated through the banks [of the sediment basins] and flowed toward the creek, carrying with it acid and chemicals from the pit.” *Id.* at 47.

In considering the evidence, the Fifth Circuit agreed with the United States, which participated in the case as *amicus curie*, that the surface runoff collected or channeled by the defendants constituted a “point source” discharge. *Id.* at 44. The government posited that the sediment basins dug by the defendants and “the collection, and subsequent percolation, of surface waters in the pits themselves” constituted point sources under the Clean Water Act. *Id.* at 45. The government argued that the fact that pollutants were carried away from the basins by gravity, rather than “an affirmative act of discharge” by the defendants, was irrelevant. *Id.*

The Fifth Circuit agreed and framed the “ultimate question” to be whether the sediment and contaminants were discharged from “discernible, confined, and discrete conveyance[s]” by either gravitational or nongravitational means. *Id.* The Court found that

[n]othing in the [Clean Water Act] relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water. Conveyances of pollution formed either as a result of natural erosion or by material means, and which constitute a component of a mine drainage system, may fit the statutory definition and thereby subject the operators to liability under the Act.

*Id.*

In coming to its determination, the *Abston* Court noted that “[s]imple erosion over the material surface, resulting in the discharge of water and other materials into navigable waters, does not constitute a point source discharge.” *Id.* at 44-45. It agreed with the Fourth Circuit that the definition of point source “excludes unchanneled and uncollected surface waters.” *Id.* at 47 (citing *Consol. Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979) and *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976)). To constitute “point source” discharge regulated by the Clean Water Act, surface runoff must have been “collected or channeled” by the defendants in connection with their mining activities. *Id.*

In *Friends of the Sakonnet v. Dutra*, 738 F. Supp. 623, 629 (D.R.I. 1990), the District Court for the District of Rhode Island considered the definition of “point source” within the broader context of the Clean Water Act’s prohibition against the “discharge of a pollutant.” The Court cautioned that “the words ‘point source’ should not be separated from the words ‘addition of any pollutant,’ nor disassociated from what they are defining, ‘discharge of a pollutant.’” *Id.* The Court found that mincing the words of the statute in this manner “can lead to absurd results that do not promote the purpose of the Clean Water Act . . . [namely,] to restore and maintain the chemical, physical and biological integrity of the nation’s waters and to eliminate the discharge of pollutants into navigable waters.” *Id.* To do this, the Court held, “Congress has placed liability with those in control of the pollutants being discharged.” *Id.*

The subject of the *Sakonnet* case was raw sewage that was flowing from a failed septic system at the Sherwood Village residential development in Portsmouth, Rhode Island, into the Sakonnet River. *Id.* at 626. The septic system failed in 1969 and, as a result, the state closed the river to shellfishing and swimming in

the area of the development. *Id.* at 627-28. In 1979, the Rhode Island Department of Environmental Management (“DEM”) investigated the septic system and found that approximately 8000 gallons per day of “raw sewage was running directly from the leaching field, on the surface of the ground for approximately 250 feet, into the Sakonnet River” and through an outfall pipe. *Id.* at 628. After holding a formal hearing, DEM issued a notice of violation under Rhode Island law to the owners; the decision and order that issued from this hearing found the owners solely responsible for repairing the septic system. *Id.* The owners never complied with the order and the town of Portsmouth made emergency repairs to the outfall pipe. *Id.* No permit had been issued by any federal or state agency authorizing the outfall pipe or its discharge into the river. *Id.*

In 1988, the Friends of the Sakonnet, an unincorporated homeowners association, and the Rhode Island Attorney General brought citizen suits under the Clean Water Act, the Rhode Island Clean Water Act, and state nuisance actions against the defendants—the present and former owners of the land on which the failed sewage system was located. *Id.* at 626-27 n.1. Plaintiffs sought declaratory, injunctive, and monetary relief. *Id.* at 627. After the complaints were filed, the defendants brought a third-party complaint against the homeowners in the Sherwood Village development and Portsmouth’s financial director. *Id.* Defendants claimed that the homeowners should be held jointly and severally liable as the “point source” of the pollution; they claimed liability against the town as the owner of the pipe that was discharging the sewage into the Sakonnet River. *Id.*

The Court noted that, in their claims and cross-claims, the parties overemphasized the importance of the stand-alone definition of “point source” and in doing so, isolated one subsection of the Clean Water Act from “the rest of a law that was written broadly to reach ‘to the fullest extent possible those sources emitting pollution into rivers, streams, and lakes.’” *Id.* at 629 (quoting *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979)). The Court noted that the “concept of point source was developed to distinguish pollution resulting from simple erosion over the surface of the ground from pollution that has been collected or comes from a confined system.” *Id.* at 630. Thus, Congress provided a definition of “point source” in the Clean Water Act not to be exhaustive about the regulated sources of pollution, but to distinguish “point source” from “nonpoint source” pollution. *Id.* The



purpose of "point source" in the definition of "discharge of a pollutant" is "to distinguish kinds of pollution, not to establish the source of liability. Liability must lie with the person or persons causing 'the addition of any pollutant to navigable waters.'" *Id.* The *Sakonnet* Court specifically cited *Abston* as support for this conclusion:

Even the cases specifically concerned with determining if a point source exists seem to recognize [that liability attaches to the cause of the pollutants]. In [*Abston*], although the court was not considering whether the defendant owned the "conveyance" for the pollutants, the Sixth Circuit's determination of liability is based on control of the pollutants that ultimately reach navigable waters.

*Id.* at 630 n.12.

The *Sakonnet* Court had little patience with defendants' "attempt to strain the definition of 'discharge of a pollutant' in order to relieve themselves of liability," an effort that "makes complete nonsense out of the Clean Water Act" and frustrates the intent of Congress to eliminate the discharge of pollutants into the nation's waters. *Id.* at 631. The Clean Water Act "requires those in control of the pollutants to use the best available control technology ("BACT") to prevent harmful pollutants from being discharged" to a water body. *Id.* As a result, the Court found against the defendants, issued a preliminary injunction against them, and ordered them to prevent any further discharge of pollutants into the Sakonnet River. *Id.* at 637.

#### D. Discussion

1. Appellee's Argument: The PCB-Contaminated Soil Beneath Appellee's Manufacturing Facility is Not a "Point Source" for the Purposes of the Clean Water Act

Neither the Clean Water Act itself nor judicial interpretation of the statute allows the Court to find that the soil beneath Appellee's manufacturing facility is a "point source" for the purposes of the Act. The plain language of the statute belies the idea that the soil is a "point source," because "soil" does not appear in the statutory definition. Further, the soil is neither a component of a "discernible, confined and discrete conveyance" created by Appellee, nor a "conveyance" of any kind. As a result, the soil beneath the

manufacturing facility is not a “point source” for the purposes of the Clean Water Act.

a. The Plain Language of the Statute Does Not Allow the Court to Find That the Soil is a “Point Source”

The definition of “point source” requires the presence of a “discernible, confined and discrete conveyance.” CWA § 502(14), 33 U.S.C. § 1362(14). Courts agree with such a requirement. *See Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980). In *Abston*, the Court found that defendants’ had actively created a “point source” because their spoil piles were “discernible, confined and discrete conveyances” that carried rainwater and pollutants to the Daniel River. *Id.* Appellee has not constructed any such conveyance. Instead, PCBs reach the Bearclaw River through a wholly natural process. As noted by the *Abston* Court, “[s]imple erosion over the material surface, resulting in the discharge of water and other materials into navigable waters, does not constitute a point source discharge.” *Id.* at 44-45. If erosion over the soil’s surface is not a point source discharge, then saturation into the soil cannot be found to be a point source discharge.

The soil itself is not a “discernible, confined and discrete conveyance.” Indeed, its ubiquity argues against its ability to be understood as “discernible, confined and discrete.” While the soil may be “discernible,” it is neither “confined” nor “discrete” in any manner contemplated by the plain language of the Clean Water Act. At any rate, the statute’s use of the connector “and” requires all three of the adjectives to be applicable to the soil. Therefore, the soil is not a “point source” as defined by the Clean Water Act.

Moreover, the definition of “point source” does not include “soil” in its inclusive list. *See* CWA § 502(14), 33 U.S.C. § 1362(14). As a result, the soil is not a statutory “point source.”

b. The PCBs—If They Are “Pollution” at All—Are Nonpoint Source Pollution, Which is Not Regulated by the Clean Water Act

The Clean Water Act provides that “it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of [the Act] to be met.” CWA § 101(a)(7), 33 U.S.C. § 1251(a)(7). The fact that these programs were to “be developed and implemented” demonstrates that they did not exist at the time of the Act’s passage by Congress.

Further, in 1987, Congress added section 319 to the Clean Water Act, 33 U.S.C. § 1329, providing a mechanism for states to address nonpoint source pollution. The legislative history makes it clear that “nonpoint sources of pollution” are limited to runoff carrying pollutants over the soil’s surface and into navigable waters after wet weather events. See S. Rep. No. 92-414, at 52 (1972), reprinted in *Legislative History of the Federal Water Pollution Control Act Amendments of 1972*, at 530-35 (1973). Consequently, the regulation of nonpoint sources of pollution is beyond the scope of the Clean Water Act. Because the PCBs are nonpoint source pollution—if they are “pollution” at all—and nonpoint source pollution is not regulated under the Clean Water Act, Appellee cannot be found liable for the migration of its PCBs into the Bearclaw River.

2. Appellant-BRK’s Argument: The PCB-Contaminated Soil Beneath Appellee’s Manufacturing Facility is a “Point Source” Within the Meaning of the Clean Water Act

The PCB-contaminated soil beneath Appellee’s manufacturing facility is a “point source” as defined by the Clean Water Act. This finding is supported by judicial interpretation of the term “point source.” Further, “point source” is in the definition of “discharge of a pollutant” to distinguish kinds of pollution, not to establish the source of liability, which must lie with the person or persons causing the addition of any pollutant to navigable waters.

a. Appellee’s PCB-Contaminated Soil is a Component of a “Discernible, Confined and Discrete Conveyance” That Discharges Pollutants into the Bearclaw River

The definition of “point source” includes the contaminated soil beneath the manufacturing facility. “The term ‘point source’ means any discernible, confined and discrete conveyance.” CWA § 502(14), 33 U.S.C. § 1362(14). To satisfy the definition of point source, the statute does not require that such a “conveyance” be manmade; in fact, some of the elements of the definition’s inclusive list contemplate naturally occurring conveyances, such as a “channel” or “discrete fissure.” CWA § 502(12), 33 U.S.C. § 1362(12). Thus, the ultimate question is whether pollutants were discharged from a “discernible, confined and discrete conveyance,” whether manmade or naturally occurring. The PCB-contaminated soil is “confined” and “discrete” because it is exclusively that soil that is located beneath Appellee’s manufac-

turing facility. It is neither all of the soil on the banks of the river, nor is it even all of the soil on the manufacturing site. Through soil sampling, the PCBs can be identified as contaminating a "discrete" portion of the soil. It is this confined soil that conveys pollutants through the groundwater and into the Bearclaw River. As Congress has recognized, "[w]ater moves in hydrologic cycles and it is essential that the discharge of pollutants be controlled at the source." See S. Rep. No. 92-414, at 77 (1972). As a natural process, the hydrologic cycle is an element of a "discernible" conveyance that is "confined" to the "discrete" characteristics of Appellee's contaminated soil. The type of soil, its location in relation to the water table, and its proximity to the Bearclaw River, all combine to determine the rate at which the PCBs contained in the soil migrate to the river after a wet weather event. It is not a question as to *whether* the PCBs will be conveyed to the river; the only variables are *at what rate* and *in what concentration* the pollutants are conveyed by Appellee's contaminated soil into the Bearclaw River.

Courts agree that a "point source" includes any combination of intentional, unintentional, manmade, and natural discharges of pollutants into navigable waters. Thus, "[g]ravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge" if the human-induced activity introduced the pollutants into the conveyance. See *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980). Nothing in the Clean Water Act relieves Appellee from liability simply because it is not engaged in "any affirmative act of discharge" of the PCBs. See *id.* at 43. Likewise, it is irrelevant that Appellee did not construct the conveyance through which its PCBs reach the Bearclaw River. See *id.* at 45. So long as Appellee's PCB-contaminated soil is "reasonably likely to be the means by which pollutants are ultimately deposited into" the Bearclaw River, it is a statutory "point source." *Id.* As the *Abston* Court held, "[c]onveyances of pollution formed either [naturally] or by material means, and which constitute a component of a mine drainage system, may fit the statutory definition and thereby subject the operators to liability under the Act." *Id.* In the present case, the conveyance is a combination of naturally occurring and human-induced activity and, therefore, subjects Appellee to liability under the Clean Water Act.

It contravenes the intent of the Clean Water Act, the structure of the statute, and judicial interpretation of the law, to exempt from regulation any activity that emits pollution from an

identifiable point. In the present case, both sides stipulate that the operation of Appellee's manufacturing facility has contaminated the soil beneath the facility. Both sides also agree that natural advection is carrying these PCBs through the soil and groundwater into the Bearclaw River. Consequently, because the point of pollution is known (i.e., the PCB-contaminated soil beneath Appellee's manufacturing operations), and because pollutants from this point are reaching the Bearclaw River, Appellee is in violation of the Clean Water Act.

b. Congress Has Placed Liability with Those Who Control the Pollutants Discharged into Our Nation's Waters

Appellee acknowledges that the soil beneath its manufacturing facility is contaminated with PCBs that percolate through the vadose zone to the groundwater, which then carries the pollutants into the Bearclaw River. Nevertheless, Appellee argues that the PCB-laden soil beneath its manufacturing facility is not a statutory "point source" and, as a consequence, cannot be the basis for liability under the Clean Water Act. In short, Appellee contests the existence of a "point source" in this case. However, "[t]he concept of point source was developed to distinguish pollution resulting from simple erosion over the surface of the ground from pollution that has been collected or comes from a confined system." *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, 630 (D.R.I. 1990). "'Point source' is in the definition of 'discharge of a pollutant' to distinguish kinds of pollution, not to establish the source of liability. Liability must lie with the person or persons causing 'the addition of any pollutant to navigable waters.'" *Id.* Appellee's manufacturing activities have resulted in the contamination of the soil with PCBs. Once introduced into the natural hydrological system by Appellee, these PCBs then percolate into the groundwater which discharges into the Bearclaw River. Because Appellee is responsible for the introduction of the PCBs into the soil, the Court should find Appellee liable for the addition of the PCBs to navigable waters.

In *Abston*, the Fifth Circuit premised defendants' liability under the Clean Water Act on their control of the pollutants, which, ultimately, reached navigable waters:

The ultimate question is whether pollutants were discharged from 'discernible, confined and discrete conveyance[s]' either by gravitational or nongravitational means. Nothing in the [Clean

Water] Act relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water.”

*Abston*, 620 F.2d at 45.

Similarly, the *Sakonnet* Court rejected the “absurd results” arising from defendants’ “[d]welling on the words ‘point source’ in isolation,” and held the owners of a failed septic system liable under the Clean Water Act “for the noxious flow that has poured freely into the Sakonnet River for the last twenty-one years.” *Sakonnet*, 738 F. Supp. at 629-30 n.10. In that case, “[t]he defendants’ attempt to strain the definition of ‘discharge of a pollutant’ in order to relieve themselves of liability and impose it on the town of Portsmouth or on [neighboring landowners] makes complete nonsense out of the Clean Water Act.” *Id.* at 631. The Court noted that the Act’s purpose is to restore and maintain the integrity of the nation’s waters by eliminating the discharge of pollutants into navigable waters or by requiring that the discharger first obtain a permit. *Id.* at 631. To meet the purposes of the Clean Water Act, “Congress has placed liability with those in control of the pollutants being discharged.” *Id.* at 629.

In the instant case, Appellee is responsible for the introduction of the PCBs into the hydrological cycle and the eventual discharge of the pollutants into the Bearclaw River. For decades, Appellee has manufactured electrical equipment at its Fort Union facility. Over the years, Appellee has spilled and leaked PCBs in such quantities that the soil beneath the facility has become saturated with the pollutants. Appellee does not contest that its PCBs reach the Bearclaw River through advection to the groundwater, which flows into the river. The soil beneath Appellee’s manufacturing facility is the only known source of PCBs in this section of the Bearclaw River. Appellee is aware that it is the source of the PCBs and that the pollutants are present in its soil at depths that reach the water table. Appellee is also aware that precipitation greatly speeds the advection process, causing an increased concentration of its PCBs to enter the Bearclaw River after it rains. Regardless, Appellee has not taken any steps to stop the discharge of its PCBs into the Bearclaw River. Because Appellee is responsible for the pollutants that are discharged into the river, this Court should find Appellee liable under the Clean Water Act.

## COUNT II:

Whether Appellee is Violating New Union's EPA-approved Water Quality Standards and, If So, Whether Appellant-BRK and Appellant-Noblesville Can Bring a Citizen Suit Under the Clean Water Act to Enforce Those Standards.

## A. Facts

New Union has adopted standards intended to regulate the quality of its navigable waters. Presumably, New Union created an inventory of all of its surface waters, divided these waters into different classes, and placed the individual surface into such classes. Within this system, New Union has classified the relevant portion of the Bearclaw River as "Class B," i.e., suitable for fishing and contact recreational use. In addition to this "use" standard, New Union's environmental regulator, NUDEC, has established specific water quality criteria of amount *X* for PCBs in "Class B" waters. The New Union legislature has passed a law stating that "[t]here shall be no detectable PCBs in 'Class B' waters." See 43 N.U.R.A.C. § 78.04 (hypothetical statute for the Moot Court Competition). As required by the Clean Water Act, the EPA approved New Union's water quality standards. See CWA § 303(c)(3), 33 U.S.C. § 1313(c)(3). Upon approval by the EPA, New Union's water quality standards became "the water quality standard for the applicable waters of that State." See CWA § 303(c)(3), 33 U.S.C. § 1313(c)(3).

Similar to New Union, the state of Progress has inventoried and classified its surface waters. Progress has classified the relevant portion of the Bearclaw River as "Class C," i.e., suitable for industrial and non-contact use. Progress has not adopted the EPA-approved specific water quality criteria for PCBs in "Class C" waters. It is unclear whether Progress has obtained approval from the EPA for its "use" standard; it is also unclear whether the EPA, in the absence of the State's doing so, has established any water quality criteria for PCBs for "Class C" waters in Progress. See CWA § 303(a)(3)(C), 33 U.S.C. § 1313(a)(3)(C).

Over time, the soil beneath the Appellee's manufacturing facility has become contaminated with PCBs. Following wet weather events, these PCBs percolate through the soil and are carried by groundwater to the Bearclaw River. The river carries the PCBs approximately one mile from Fort Union, Progress to Noblesville, New Union. The PCBs have contaminated the soil on

the banks of the Bearclaw River in New Union, the Noblesville public beach, and the sediment of the river itself.

### B. Positions of the Parties

Appellee does not contest that New Union's water quality standards for PCBs are violated after wet weather events or that these violations are caused, largely, if not entirely, by Appellee's PCBs. However, Appellee does argue that a violation of New Union's water quality standards is not an enforceable violation of the Clean Water Act. To the extent that Appellants' claim contemplates nonpoint source pollution, it falls outside of the regulation of the Clean Water Act. Further, Appellee argues that CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1), under which Appellants have brought suit, authorizes causes of action as against violations of "an effluent standard or limitation," which the section defines as a violation of CWA § 301, 33 U.S.C. § 1311, or a list of specific violations that do not include violations of water quality standards.

Appellant-BRK and Appellant-Noblesville argue that Appellee's PCBs in the Bearclaw River violate New Union's water quality standards and that this violation is actionable under CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1).

### C. Law

#### 1. The Statute

The Clean Water Act seeks to attain "water quality which provides for the protection and propagation of fish . . . and . . . recreation in and on the water." CWA § 101(a)(2), 33 U.S.C. § 1251(a)(2). The Act anticipates that regulators at the state and local level will work with federal agencies to "develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." CWA § 101(g), 33 U.S.C. § 1251(g).

To achieve these goals, the Clean Water Act establishes roles for federal and state governments. The EPA must, *inter alia*, establish and enforce "effluent limitations" on industry-specific discharges into the country's navigable waters. CWA §§ 301(b)(1)(A), 304, 33 U.S.C. §§ 1311(b)(1)(A), 1314. In addition, each state must institute comprehensive water quality standards, subject to federal approval, that establish water quality goals for all intra-state waters. CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). As discussed below, a state's authority to enforce water quality stan-



dards is contained in sections 301, 401, and, by reference, 303 of the Act. Finally, the Clean Water Act allows each state to enforce "any State law or regulations," including those that involve water quality standards, through a combination of the state certification program, CWA § 401, 33 U.S.C. § 1341, and the "savings clause," CWA §§ 505(e), 510, 33 U.S.C. §§ 1365(e), 1370.

Section 401 of the Act, 33 U.S.C. § 1341, establishes the state certification process, which allows states to approve or disapprove of federal NPDES permits that will affect the quality of the state's surface waters. Specifically, the certification process provides that,

Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharges originates or will originate . . . that any such discharge will comply with the applicable provisions of sections [1311, 1312, 1313, 1316, and 1317 of this title].

CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). The EPA may not issue a federal NPDES permit unless and until the permit applicant obtains certification from the state, or the state waives its right to establish a certification process. *Id.*

A state may impose water quality limitations on "any activity" to be undertaken by the NPDES permit applicant, "including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters." CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). The EPA's regulations that implement the state certification process expressly require the certifying state to find that "there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." 40 C.F.R. § 121.2(a)(3). If the permit applicant's "activity" does violate applicable water quality standards, then the applicant must either alter the activity or forgo the requested NPDES permit.

A water quality standard "consist[s] of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A). Water quality standards reflect

the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by set-

ting criteria necessary to protect the uses. States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act.

#### 40 C.F.R. § 131.2.

In addition to defining “water quality standards,” the EPA has defined “designated uses” and “water quality criteria.” “Designated uses are those uses specified in water quality standards for each water body or segment whether or not they are being attained.” 40 C.F.R. § 131.3(f). Water quality “[c]riteria are elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use.” 40 C.F.R. § 131.3(b).

The Clean Water Act provides a state with three means by which it can directly regulate the quality of its surface waters. First, as discussed above, it can establish and administer a SPDES permitting program. CWA § 402(a)(5), (b), 33 U.S.C. § 1342(a)(5), (b). Second, regardless of whether it has a SPDES program, a state can approve or disapprove of the issuance of federal NPDES permits through its “certification” process. CWA § 402, 33 U.S.C. § 1342. Finally, the Clean Water Act creates a “savings clause,” which reserves to the state the right to apply its own laws to the protection of its water resources. CWA § 510, 33 U.S.C. § 1370.

The authority of the certifying state extends beyond those discharges contemplated in the NPDES permit application. The certification process allows the state to impose “other limitations” on the project to assure compliance with the Clean Water Act and with “any other appropriate requirement of State law”:

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations . . . and with any other appropriate requirement of State law set forth in such certification and shall become a condition on any Federal license or permit subject to the provisions of this section.

CWA § 401(d), 33 U.S.C. § 1341(d). The EPA has clarified that “[i]n 401(d), the Congress has given the States the authority to place any conditions on a water quality certification that are necessary to assure that the applicant will comply with effluent limitations, water quality standards, . . . and with ‘any other appropriate requirement of State law.’” *PUD No. 1 of Jefferson County v. Wash. Dep’t of Ecology* (PUD No. 1), 511 U.S. 700, 712 (1994) (quoting EPA, *Wetlands and 401 Certification* 23 (Apr. 1989)).

Although section 401(d) does not explicitly reference section 303, ensuring compliance with a state’s water quality standards is a proper function of the state certification program, because the Act allows states to impose limitations to ensure compliance with section 301. See CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). Further, “[s]ection 303 is always included by reference where section 301 is listed.” See *PUD No. 1*, 511 U.S. at 712 (1994) (quoting H.R. Conf. Rep. No. 95-830, at 96 (1977)). Section 301 provides that,

There shall be achieved . . . any more stringent limitation, including those necessary to meet water quality standards . . . established pursuant to any State law or regulations . . . or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). As a result, the direct reference to effluent limitations in the state certification process includes reference to the state’s water quality standards, among the “other limitations” the state may impose to ensure compliance with the certification process.

Thus, the Clean Water Act grants states the authority to impose conditions on “any applicant” seeking a federal permit to discharge pollutants into navigable waters. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). Further, the Clean Water Act expands a state’s authority to place restrictions on the applicant’s activity in order to ensure compliance with the statute or “other limitations,” including appropriate state law requirements. *Id.* The state certification process includes the enforcement of water quality standards through the process’s direct reference to the imposition of effluent limitations.

Two sections of the Clean Water Act explicitly preserve a state’s right to enforce water pollution requirements that may be

more stringent than those contained in an NPDES permit. Section 510 of the Act, 33 U.S.C. § 1370, states that “[e]xcept as expressly provided . . . nothing in this Act shall . . . be construed as impairing or in any other manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.” Section 505(e) of the Act, 33 U.S.C. § 1365(e), provides that “[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief.” Collectively, these two sections are generally referred to as the “savings clause” of the Clean Water Act and preserve a state’s right to establish and enforce water quality standards for its surface waters.

The Clean Water Act imposes on the EPA a duty to protect the interests of “downstream” states. Section 301 of the Clean Water Act requires an NPDES or SPDES permit to impose any effluent limitations necessary to comply with applicable state water quality standards. *See* CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

As discussed above, section 402(b) authorizes each state to establish “its own permit program for discharges into navigable waters within its jurisdiction.” CWA § 402(b), 33 U.S.C. § 1342(b). The upstream state’s SPDES program must satisfy the Clean Water Act’s procedural protections for downstream states, including providing notice and the opportunity to comment on the program. CWA §§ 402(b)(3), (5), 33 U.S.C. §§ 1342(b)(3), (5). Although these provisions do not authorize the downstream state to veto the issuance of a SPDES permit by the upstream state, the EPA retains authority to block the issuance of any state-issued permit that is “outside the guidelines and requirements” of the Clean Water Act. *See* CWA § 402(d)(2), 33 U.S.C. § 1342(d)(2).

A downstream state has similar protection against a discharger operating under a federal NPDES permit. The EPA’s issuance of such a permit is subject to the “same terms, conditions, and requirements” as the upstream State’s SPDES permit issuance. CWA § 402(a)(3), 33 U.S.C. § 1342(a)(3). In addition, the EPA has construed the Clean Water Act as requiring federal NPDES permits also to comply with CWA § 401(a), 33 U.S.C. § 1311(a). CWA § 401(a)(2), 33 U.S.C. § 1341(a)(2) provides that,

Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the

Administrator . . . shall so notify such other State, the licensing or permitting agency, and the applicant. If . . . such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, . . . and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing . . . . Such agency . . . shall condition such license or permit in such a manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

Thus, this section appears to prohibit the issuance of a federal NPDES permit over the objection of an affected state, unless compliance with the affected state's water quality standards can be ensured.

In issuing NPDES permits, the EPA "shall prescribe conditions . . . to assure compliance with the requirements of [the NPDES program] and such other requirements as [it] deems appropriate." CWA § 402(a)(2), 33 U.S.C. § 1342(a)(2). The EPA's regulations provide that an NPDES permit shall not be issued "[w]hen the imposition of conditions cannot ensure the compliance with the applicable water quality requirements of all affected States." 40 C.F.R. § 122.4(d) (2005). *See also* 40 C.F.R. § 122.44(d). This restriction applies whether the permit is issued by the EPA or by an approved state SPDES program. *See* 40 C.F.R. § 123.25 (2005). Finally, the Clean Water Act provides the EPA with broad authority to oversee federal and state permit programs: "No permit shall issue . . . if the Administrator . . . objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act." CWA § 402(d)(2), 33 U.S.C. § 1342(d)(2).

## 2. Judicial Interpretation

The Supreme Court has recognized the central role of states in upholding their water quality standards through both their state certification process and the NPDES/SPDES permitting program. *See PUD No. 1 of Jefferson v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994); *Arkansas v. Oklahoma*, 503 U.S. 91 (1992).

In *PUD No. 1*, the facts considered by the Supreme Court dealt with whether the state environmental agency properly conditioned a federal permit on the maintenance of water quality standards that would maintain specific minimum stream flows to

protect salmon and steelhead runs. *PUD No.1*, 511 U.S. at 703. The specific issue before the Court was whether the minimum stream flow requirement imposed by Washington State on a proposed hydroelectric project was a permissible condition of the state's certification process. *Id.* at 710. The Court found that Washington State had acted within its authority and that the minimum stream flow requirement fell within the scope of CWA § 401 as an enforceable water quality standard. *Id.*

The Court considered the petitioners' complaint, a city and local utility district that wanted to build a hydroelectric plant on the Dosewallips River in Washington State. *Id.* at 703. The project would divert water from a 1.2-mile reach of the river (the "bypass reach"), run the water through turbines to generate electricity, and then discharge the water back into the river at a point below the bypass reach. *Id.* at 708-09. Because the project required a license from the Federal Energy Regulatory Commission (FERC) and would result in discharges to a navigable water, petitioners were required by the CWA to obtain Washington's certification of the project. *Id.* at 709.

Under its administrative code, Washington had adopted comprehensive water quality standards intended to regulate all of its navigable waters. *Id.* at 705. Washington had inventoried all of its surface waters, which it divided into five classes. *Id.* Washington classified the Dosewallips River as "AA, extraordinary." *Id.* The water quality standard for Class AA waters was set forth in the Washington Administrative Code at 173-201-045(1), which identified both the designated use of the water and the criteria applicable to such waters. *Id.* at 705-06. As a Class AA water, the Dosewallips River's characteristic uses included "[s]almonid migration, rearing, spawning, and harvesting. Other fish migration, rearing, spawning, and harvesting [and] . . . [w]ildlife habitat." *Id.* at 706 n.1. The water quality criteria for the Dosewallips included specific numeric measurements for, *inter alia*, fecal coliform, dissolved oxygen, temperature, and turbidity. *Id.* Pursuant to the requirements of the Clean Water Act, the EPA had reviewed and approved Washington's water quality standards. *Id.* at 707. In its assessment of petitioners' project and based on these water quality standards, Washington undertook a study to determine the minimum stream flows necessary to protect the salmon and steelhead fishery in the bypass reach. *Id.* at 709. Washington issued a certification, which imposed a variety of conditions on the proposed hydroelectric project, including the seasonal mainte-

nance of minimum stream flows in the bypass reach. *Id.* Petitioners challenged the imposition of the conditions and the case made its way through the appeals process to the Supreme Court.

With regard to the scope of Washington's certification authority, petitioners argued that the minimum stream flow requirement imposed by the state was unrelated to the specific discharges contemplated in its permit application. *Id.* at 711. Because the state's minimum flow requirement was not specifically premised on the dam's discharges, the state lacked authority under CWA § 401 to condition its certification on maintenance of stream flows sufficient to protect the Dosewallips' fishery. *Id.* The Court dismissed petitioners' argument, noting that CWA § 401 applies to "any applicant," not to a "discharge" and, as such, "allows the State to impose 'other limitations' on the project in general to assure compliance with various provisions of the Clean Water Act and with 'any other appropriate requirement of State law.'" *Id.* The Court noted that its interpretation of the statute was consistent with the EPA's regulations implementing the certification process, which "expressly interpret § 401 as requiring the State to find that 'there is a reasonable assurance that the *activity* will be conducted in a manner which will not violate applicable water quality standards.'" *Id.* at 712 (quoting 40 C.F.R. § 121.2(a)(3) (1993) (emphasis added)). Thus, the Court found the EPA's determination that activities must also comply with water quality standards to be reasonable and "entitled to deference." *Id.* (citing *Arkansas v. Oklahoma*, 503 U.S. 91 (1992); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

The Court also found that the scope of Washington's certification authority included ensuring compliance with water quality standards. *Id.* The Court noted that, although CWA § 303 "is not one of the statutory provisions listed in § 401(d), the statute allows States to impose limitations to ensure compliance with § 301 of the Act." *Id.* at 712-13. In turn, CWA § 301 incorporates CWA § 303 by reference. *Id.* at 713. As a result, Washington's minimum stream flow water quality standards that it adopted pursuant to CWA § 303 "are among the 'other limitations' with which a State may ensure compliance through the § 401 certification process." *Id.*

In its determination of the case, the Court considered whether the minimum stream flow requirement was a permissible limitation upon which Washington could condition its certification. Petitioners argued that CWA § 303 required the state to protect

designated uses “solely through implementation of specific ‘criteria.’” *Id.* at 714. According to this argument, the Clean Water Act did not allow Washington to require petitioners “to operate their dam in a manner consistent with a designated ‘use’; instead, . . . under § 303 the State may only require that the project comply with specific numerical ‘criteria.’” *Id.*

The Court made short order of this argument through a plain-language reading of the statute, which requires that state water quality standards “‘consist of the designated uses of the navigable waters involved *and* the water quality criteria for such waters based upon such uses.’” *Id.* at 714 (quoting CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A) (emphasis added)). The Court found that the statutory “text makes it plain that water quality standards contain two components . . . [and a]ccordingly, under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.” *Id.* at 714-15. A state may rightfully deny certification to a project that does not comply with both the designated uses and the water quality criteria of the state’s water quality standards. *Id.* at 715.

In *Arkansas v. Oklahoma*, the Court considered the issue of whether the EPA’s finding that discharges from a new source located in Arkansas, the upstream state, would cause a detectable violation of the water quality standards of Oklahoma, the downstream state. *See Arkansas v. Oklahoma*, 503 U.S. 91, 94 (1992). The Court discussed at length the “EPA’s duty to protect the interest of the downstream State.” *Id.* The EPA holds this duty through its administration of the NPDES permitting program, the “primary means for enforcing” water quality standards. *Id.* at 101. As a result, the NPDES permitting program provides a reasonable basis for the EPA to exercise its “substantial statutory discretion” and require an upstream discharger to comply with a downstream State’s water quality standards. *Id.* at 107.

The relevant facts of *Arkansas* are as follows: In 1985, the City of Fayetteville, Arkansas, applied to the EPA for an NPDES permit to discharge treated sewage effluent into an unnamed stream in northwestern Arkansas. *Id.* at 95. The stream flows “through a series of three creeks for about seventeen miles, and then enters the Illinois River at a point twenty-two miles upstream from the Arkansas-Oklahoma border.” *Id.* Fayetteville’s NPDES permit imposed specific limitations on the quantity, content, and character of the sewage discharge and included a special



provision that, if a study then underway indicated the imposition of "more stringent limitations . . . to ensure compliance with Oklahoma's water quality standards, [then] the permit would be modified to incorporate those limits." *Id.*

Oklahoma challenged Fayetteville's permit in an administrative hearing before the EPA, charging that the sewage discharge violated Oklahoma's state water quality standards. *Id.* The case proceeded through the administrative law channels and, ultimately, the EPA sustained the issuance of Fayetteville's NPDES permit, conditioned on the requirement that its discharge not detectably violate Oklahoma's water quality standards. *Id.* at 95-98. Dissatisfied with the terms imposed by the EPA on the permit, both Arkansas and Oklahoma sought judicial review in the Court of Appeals. *Id.* at 97. The Tenth Circuit agreed with the EPA that the CWA required Fayetteville to comply with Oklahoma's water quality standards, but then went on to reverse the EPA's issuance of the permit, relying on a theory that neither side had advanced. *Id.* at 98. Namely, the Court held that the EPA may not issue an NPDES permit to a proposed source where such a source "would discharge effluents that would contribute to conditions currently constituting a violation of applicable water quality standards." *Id.* The Supreme Court granted certiorari on the issue of whether the CWA requires the "EPA, in crafting and issuing a permit to a point source in one State to apply the water quality standards of downstream States." *Id.* at 104. Wary of transgressing the EPA's "substantial statutory discretion," the Court reframed the question and found that "[e]ven if the Clean Water Act itself does not require the Fayetteville discharge to comply with Oklahoma's water quality standards, the statute clearly does not limit the EPA's authority to mandate such compliance." *Id.* at 105.

The Court briefly analyzed the statute and its regulations to come to its conclusion. First, "[s]ince 1973, EPA regulations have provided that an NPDES permit shall not be issued 'when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.'" *Id.* at 105 (internal citations omitted). This restriction applies equally to NPDES and SPDES permits. *Id.* at 105 n.10. Second, several provisions in the Clean Water Act vest the EPA with "broad discretion to establish conditions for NPDES permits." *Id.* at 105. For example, CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) "expressly identifies the achievement of state water quality standards as one

of the Act's central objectives. The Agency's regulations conditioning NPDES permits are a well-tailored means of achieving this goal." *Id.* at 106. In addition, section 402 of the Act, 33 U.S.C. § 1342, requires "that for EPA-issued permits 'the Administrator shall prescribe conditions . . . to assure compliance with the requirements of [this section] and *such other requirements as he deems appropriate*,'" including State water quality standards. *Id.* at 105 (quoting CWA § 402, 33 U.S.C. § 1342 (emphasis added)). Finally, the Court noted that the EPA's regulations "were a perfectly reasonable exercise of the Agency's statutory discretion [because] . . . the application of state water quality standards in the interstate context is wholly consistent with the Act's broad purpose 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Id.* at 105-06 (quoting CWA § 101, 33 U.S.C. § 1251(a)). As a result, the Court found reasonable the EPA's use of the NPDES permitting process to impose a downstream state's water quality standards on an upstream discharger in another state.

#### D. Discussion

##### 1. Appellee Argument: State Water Quality Standards Are Not Enforceable Under the Clean Water Act

In the preceding action, the District Court considered the question of whether Appellee's PCBs violate New Union's water quality standards for PCBs and, thereby, create a cognizable cause of action under the Clean Water Act. Appellee does not contest that New Union's water quality standards for PCBs were violated after wet weather events or that the violations were largely, if not entirely, caused by Appellee's PCBs entering the Bearclaw River. Instead, Appellee argues that a violation of New Union's water quality standards is not an enforceable violation of the Clean Water Act because such violation is not the result of a "discharge," and further, is not a violation of an "effluent standard or limitation."

Appellee's contention is without basis. The Clean Water Act creates a number of enforcement avenues through which the appropriate federal or state regulatory agency, or private citizens, can bring suit against a polluter to stop the degradation of our nation's waters. One of these avenues is the citizen suit provision which authorizes "any citizen" to commence a civil action against "any person . . . who is alleged to be in violation of (A) an effluent

standard or limitation under this Act . . . or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1). In the present case, both Appellant-BRK and Appellant-Noblesville are appropriate "citizen[s]," who may commence an action as against Appellee for its violation of both an "effluent standard or limitation" and "an order issued by" the State of New Union "with respect to such a standard or limitation." *Id.* See also CWA § 505(g), 33 U.S.C. § 1365(g) (defining "citizen").

Further, as decided by the Supreme Court, the EPA has substantial statutory discretion to impose permit conditions to ensure compliance with the applicable water quality requirements of all affected states. See *Arkansas v. Oklahoma*, 503 U.S. 91, 105-07 (1992). In fact, the EPA's regulations require it to do so. See *id.* In the current case, Appellee does not argue that New Union's water quality standards for PCBs are violated after wet weather events or that these violations are caused by Appellee's PCBs. New Union has classified the Bearclaw River as "Class B" waters and has adopted limitations for PCBs in "Class B" waters in amount X. Contrary to Appellee's argument, New Union's water quality standards do not merely characterize the use and criteria of water bodies within the state. Instead, they are conditions that the EPA shall prescribe to ensure compliance with the NPDES permitting program. See CWA § 402(a)(2), 33 U.S.C. § 1342(a)(2). As a result, this Court should require the EPA to revise Appellee's existing NPDES permit to ensure compliance with New Union's water quality standards for PCBs. This Court should also find that Appellee is in violation of an "effluent standard or limitation" for the purposes of this citizen suit action.

## 2. Appellant-BRK and Appellant-Noblesville Argument: State Water Quality Standards Are Enforceable Under the Clean Water Act

A violation of a state's water quality standards is an actionable violation of an "effluent standard or limitation" because CWA § 505(f), 33 U.S.C. § 1365(f), defines "effluent standard or limitation" to include either the discharge from a point source, or the existence of an in-state certification process. However, even though Appellee is incorrect in its contention that citizen suits are limited to enforcing violations of CWA § 301(a), 33 U.S.C. § 1311(a), Appellants' ability to prevail on Count II is conditioned on whether this Court finds that the PCB-contaminated soil is a

“point source” under Count I. If so, then Appellants should be able to proceed with their claim that Appellee’s unpermitted point source violates an “effluent standard or limitation” under CWA § 505(f). If the Court finds that the PCB-contaminated soil is not a point source, then the PCB discharge is implicitly defined as nonpoint source pollution that is not regulated under the Clean Water Act and is, therefore, beyond the reach of this citizen suit.

However, regardless of whether this Court finds that the PCBs are point source or nonpoint source pollution, Appellant-BRK and Appellant-Noblesville should still be able to bring suit as against Appellee in this Court pursuant to the Clean Water Act’s “savings clause.” In this case, New Union has adopted water quality standards for PCBs in the Bearclaw River and a state statute regulating PCBs in “Class B” waters, *see* 43 N.U.R.A.C. § 78.04. Section 505(e) of the Act, 33 U.S.C. § 1365(e), provides that “[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief.” In this context, water quality standards can be defined as an effluent standard. New Union has enacted a designated use for the relevant portion of the Bearclaw River, i.e., “Class B” waters, and water quality criteria of amount *X* for PCBs in “Class B” waters. New Union has also enacted a state law, which provides that “[t]here shall be no detectable PCBs in ‘Class B’ waters.” *See* 43 N.U.R.A.C. § 78.04. As a result, CWA § 505(e) should allow Appellant-BRK and Appellant-Noblesville to bring suit against Appellee for violating “any right” that the parties’ have under 43 N.U.R.A.C. § 78.04 to seek enforcement of New Union’s water quality standards or any other relief.

### COUNTS III, IV, AND V:

The issues under these counts include the following:

- Whether the Clean Water Act So “Occupies the Field” of Interstate Water Pollution That It Pre-empts Appellants From Bringing Nuisance Actions Sounding in Federal and State Common Law and Arising From Appellee’s Nonpoint Source Pollution of the Bearclaw River
- Whether the Clean Water Act Pre-empts State Common Law of Nuisance for Nonpoint Source Pollution Originating in Another State

- Whether Appellant-BRK May Maintain a Public Nuisance Claim on Behalf of Its Members Under the "Special Injury" Rule

### A. Facts

The facts relevant to Counts III, IV, and V are substantially the same as the facts recited earlier in section II.A. above.

### B. Positions of the Parties

Appellee argues that the Clean Water Act preempts both the federal common law of nuisance and the state common law of nuisance in states other than the state in which a discharge occurs. On this basis, Appellee contends that the public nuisance claims of Appellant-BRK and Appellant-Noblesville must fail. Further, Appellee argues that private parties may bring a public nuisance claim only if they suffer an injury different from the injuries suffered by the general public. Appellee continues that, because Appellant-BRK is a private party and does not suffer injuries different from those of the general public, Appellant-BRK does not have standing to sue and its claim must be dismissed.

Appellant-BRK argues that the Clean Water Act does not preempt either federal or state common law of nuisance, because it does not "occupy the field" of nonpoint source pollution. Further, Appellant-BRK contends that its members do suffer "special injury" because, unlike the general public, they are an ethnic minority and economically disadvantaged. Appellant-BRK's members rely on the Noblesville public beach as a recreation destination and engage in sustenance fishing on the Bearclaw River. As a result, they are more vulnerable than the general public to exposure to PCBs in the soil, water, and fish. Consequently, because federal or state law does not preempt the common law of nuisance, and because its members suffer "special injury," Appellant-BRK asserts that Appellee is liable under nuisance law.

Appellant-Noblesville agrees with Appellant-BRK that the Clean Water Act does not preempt claims of nuisance arising under either federal or state common law. However, Appellant-Noblesville contends that, as the local government, it, rather than Appellant-BRK, is the appropriate party to bring a public nuisance action on behalf of all of its residents. Appellee does not argue that Appellant-Noblesville is the proper plaintiff in the pub-

lic nuisance action, but continues to maintain that the Clean Water Act precludes such an action.

### C. Law

#### 1. The Clean Water Act's Pre-emptive Force as to Federal Common Law

Prior to the passage of the Clean Water Act in 1972, states premised transboundary water pollution disputes on the federal common law of nuisance and brought suit to abate such nuisance directly to the Supreme Court. *See, e.g., New Jersey v. City of New York*, 284 U.S. 585 (1931); *New York v. New Jersey*, 256 U.S. 296 (1921); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 180 U.S. 208 (1901)). The Court heard these cases in the exercise of its original jurisdiction over controversies between states. U.S. Const. art. III, § 2 (providing that the judicial power extends to controversies between two or more states and to controversies between a state and citizens of another state and specifying that the Supreme Court has original jurisdiction over cases in which a state shall be a party). The Court recognized that it was the body uniquely capable of resolving disputes that, if they "arose between independent sovereignties, might lead to war." *Missouri v. Illinois*, 200 U.S. 496, 518 (1906) (explaining the Court's prior decision in *Missouri v. Illinois*, 180 U.S. 208 (1901), which upheld the Supreme Court's jurisdiction to hear an interstate pollution dispute). Thus, in a series of cases that spanned seven decades, the Court adjudicated interstate water pollution disputes and fashioned a federal common law of nuisance. *See Vermont v. New York*, 417 U.S. 270 (1974); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *New Jersey v. City of New York*, 284 U.S. 585 (1931); *New York v. New Jersey*, 256 U.S. 296 (1921); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 200 U.S. 496, 518; *Missouri v. Illinois*, 180 U.S. 208 (1901). On several occasions, the Court used its equitable powers to issue injunctions restricting interstate pollution or requiring that states construct waste disposal facilities. *See, e.g., New Jersey v. City of New York*, 284 U.S. 585; *Wisconsin v. Illinois*, 281 U.S. 696 (1930); *Georgia v. Tenn. Copper Co.*, 237 U.S. 474 (1915).

In the early 1970s, however, as environmental problems became increasingly prominent national issues, the Court began to signal a fundamental shift in its attitude toward resolving transboundary water pollution disputes. In the months before the pas-

sage of the Clean Water Act, Illinois sought leave from the Supreme Court to file a bill of complaint against four Wisconsin cities and the sewerage commissions of the city and county of Milwaukee. *See Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91 (1972). Illinois alleged that the cities and county were discharging 200 million gallons per day of raw or inadequately treated sewage into Lake Michigan and that it, and its subdivisions, prohibited such discharges. *Id.* at 93. Illinois sought an order from the Supreme Court requiring that the nuisance created from the sewage be abated. *Id.*

In an opinion by Justice Douglas, a unanimous Court declined to exercise its original jurisdiction because the dispute was not between two states and Illinois could otherwise seek redress in federal court. *Id.* at 108. However, although the Court declined to grant Illinois' request for leave, it did not preempt the federal common law of nuisance. Instead, the Court recognized that the various laws that Congress had enacted "touching interstate waters" were "not necessarily the only federal remedies available." *Id.* at 101, 103. The Court noted that the "application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with [existing federal legislation]." *Id.* at 104. The Court presaged, however, that,

It may happen that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance. But until that time comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.

*Id.* at 107.

On May 19, 1972, Illinois again filed suit against the City of Milwaukee and other Wisconsin cities in the United States District Court for the Northern District of Illinois, this time seeking abatement under federal common law of the alleged nuisance created by the cities' sewerage discharges. *See Illinois ex rel. Scott v. City of Milwaukee*, 366 F. Supp. 298 (N.D. Ill. 1973). Five months later, Congress passed the Federal Water Pollution Control Act Amendments of 1972, which established a new system of regulations that prohibited the unpermitted discharge of pollutants into navigable waters. *See CWA* §§ 301, 402, 33 U.S.C. §§ 1311, 1342. As required by the new legislation, the defendant Wisconsin cities obtained discharge permits from the Wisconsin Department of Natural Resources, which the EPA had authorized to operate the

state's federal permit program. See *EPA v. State Water Control Res. Bd.*, 426 U.S. 200, 208 (1976).

On January 11, 1977, trial commenced on Illinois' federal common law nuisance claim. See *Illinois v. City of Milwaukee*, 8 Env'tl. L. Rep. 20503 (N.D. Ill. 1978). The District Court found that Illinois had proven the existence of a nuisance under federal common law and ordered the defendant Wisconsin cities to abate their discharges. *Id.* On appeal, the Seventh Circuit held that the Clean Water Act had not preempted the federal common law of nuisance, but that "[in] applying the federal common law of nuisance in a water pollution case, a court should not ignore the Act but should look to its policies and principles for guidance." *City of Milwaukee v. Illinois*, 599 F.2d 151, 164 (7th Cir. 1979). The defendant Wisconsin cities sought review of the Seventh Circuit's decision by the Supreme Court. *City of Milwaukee v. Illinois*, 445 U.S. 926 (1980).

On December 2, 1980, the parties argued before the Supreme Court and focused largely on the question of whether the Clean Water Act had preempted the federal common law of nuisance. See *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304 (1981). To determine when federal common law should apply to water pollution disputes, the Court articulated a preemption test: In order to determine whether a federal statute displaces federal common law, the Court should undertake "an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law." *Id.* at 315 n.8.

The Court applied this test to Illinois' nuisance complaints against the defendants' discharges to Lake Michigan and found that the Clean Water Act had created a permit scheme that addressed the very concerns raised by Illinois. *Id.* at 305. As a result, because the *Milwaukee II* facts fell precisely within the rubric of the NPDES permitting scheme, the Court was not free to formulate different federal standards "through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence." *Id.* at 307. The Court thus held that the Clean Water Act preempts the federal common law of nuisance in interstate water pollution cases that involve the discharge of a pollutant from a point source. *Id.* at 317. The Court premised its holding on a separation of powers argument:



Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency . . . the Amendments were viewed by Congress as a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation considered in [*Milwaukee I*] . . . Congress' intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation. Every point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals.

*Id.* at 317-18 (citations omitted).

## 2. The Clean Water Act's Preemptive Force As to State Common Law

The Court in *Milwaukee II* left open the question whether the 1972 Amendments had supplanted state common law remedies, in addition to the federal common law remedy. *See id.* at 310 n.4. The Court subsequently addressed the issue of whether the Clean Water Act preempted a state's common law of nuisance in *International Paper Co. v. Oullette*, 479 U.S. 481, 483 (1987). The question presented was whether the Clean Water Act preempts a common law nuisance suit filed in a Vermont court under Vermont law, when the source of the alleged injury was located in New York. In the courts below, Vermont property owners claimed that pollution discharged into Lake Champlain by a paper mill located in New York constituted a "continuing nuisance" under Vermont common law. *Oullette v. Int'l Paper Co.*, 602 F. Supp. 264, 266 (D. Vt. 1985). The paper mill was operating pursuant to and in compliance with an NPDES permit. *Id.* The basis of the Vermonters' claim was that discharges from the paper mill fouled the waters around their properties, "interfering with the use and enjoyment of the property and, consequently, diminishing its value." *Id.* Plaintiffs sought compensatory damages, punitive damages, and injunctive relief which would require the paper company to restructure part of its water treatment system. *Id.*

The Vermont District Court acknowledged that federal law generally governs interstate water pollution, but found that two sections of the Clean Water Act explicitly preserve state law

rights of action. *Id.* at 268. First, the Act provides that except as expressly provided, “nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.” *Id.* (quoting CWA § 510, 33 U.S.C. § 1370). Second, the statute provides that “nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . .” *Id.* (quoting CWA § 505(e), 33 U.S.C. § 1365(e)). The Vermont District Court held that these two provisions together constituted a “savings clause,” which made it clear that federal law did not preempt entirely the rights of states to control pollution. *Id.* The Court held that a state action to redress interstate water pollution could be maintained under the common law of the state in which the injury occurred. *Id.*

In adopting its holding, the Vermont District Court rejected the position of the Seventh Circuit that the “savings clause” preserved state nuisance law only as it applies to discharges occurring within the source state. *Id.*; see also *Illinois v. Milwaukee (Milwaukee III)*, 731 F.2d 403 (7th Cir. 1984). The Vermont District Court certified its decision for interlocutory appeal and the Court of Appeals for the Second Circuit affirmed. *Oullette v. Int’l Paper Co.*, 776 F.2d 55, 56 (2d Cir. 1985) (*per curiam*). The Supreme Court granted certiorari to resolve the conflict between the Second and Seventh Circuits. See *Int’l Paper Co. v. Oullette*, 475 U.S. 1081 (1986).

The Supreme Court found that the Clean Water Act did not preempt the state common law nuisance action, but limited the state law applicable to an interstate discharge to be “the law of the State in which the point source is located.” *Oullette*, 479 U.S. 481, 487. The Court reasoned that allowing affected states to impose their own separate discharge standards on source states would invariably create a serious interference with achievement of the full purposes of Congress. *Id.* at 493-94. Holding a discharger in another state liable for violating more stringent requirements of state nuisance law in the receiving state would compel the discharger to adopt different control standards than those approved by the EPA in the discharger’s home state. *Id.* at 495. The inevitable result would be to allow states to “do indirectly what they could not do directly—regulate the conduct of out-of-State sources.” *Id.* This would undermine the predictability and effi-

ciency of the Clean Water Act's NPDES permit scheme and could subject a discharger to a variety of "vague" and "indeterminate" common law rules adopted by downstream states. *Id.* at 496.

Thus, the Court found that, in situations involving an otherwise valid NPDES permit in the source state, state common law actions founded on the law of the receiving state were preempted. *Id.* at 500. However, the Court also held that "nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State." *Id.* at 497. Because the Clean Water Act expressly preserves the right of states to impose more stringent standards on their own point sources, actions brought under the nuisance law of source states will not interfere with the balance of interests reflected in the Act. *Id.* at 498-99. Because federal courts sitting in diversity are competent to apply the law of other states, the *Oullette* plaintiffs were free to continue their lawsuit in Vermont's federal district court so long as it applied New York nuisance law to their claims. *Id.* at 500.

### 3. The Regulation of Nonpoint Source Pollution Under the Clean Water Act: CWA § 319

In 1987, Congress amended the Clean Water Act to add a provision that addresses nonpoint source pollution. This new section, CWA § 319, 33 U.S.C. § 1329, requires states to prepare, for approval by the EPA, "State assessment reports" and "State management programs" for the control of nonpoint source pollution within each state. CWA §§ 319(a), (b), 33 U.S.C. §§ 1329(a), (b). States with approved nonpoint source management programs are eligible, on a cost-sharing basis, to receive technical assistance and federal grants to aid in the implementation of the program. *See* CWA §§ 319(f), (g), 33 U.S.C. §§ 1329 (f), (g). States with disapproved nonpoint source management programs are not eligible to receive such assistance and, further, must revise and resubmit their plans to the EPA for approval. *See* CWA § 319(d)(2), 33 U.S.C. § 1329(d)(2).

### 4. The Law of Public Nuisance

A public nuisance is an "unreasonable interference with a right common to the general public." *Restatement (Second) of Torts* § 821B(1) (1979). In contrast, a private nuisance is "a non-trespassory invasion of another's interest in the private use and enjoyment of land." *Id.* § 821D. An interference with a public right may be "unreasonable" where it significantly affects the pub-

lic health, safety, peace, comfort, or convenience, or is of a “continuing nature or has produced a permanent or long-lasting effect” upon the public right. *Id.* § 821B(2)(a). The Restatement makes clear that “[c]onduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right.” *Id.* § 821B cmt. g. The Restatement (Second) of Torts provides an example:

[T]he pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. If, however, the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the right to fish, it becomes a public nuisance.

*Id.*

Generally, to maintain a proceeding to abate a public nuisance, a party must have authority as a public entity. *Id.* § 821C(2)(b). A private entity may bring a public nuisance claim, however, where it can show that it has the right to recover damages and standing to sue as a representative of the general public or as a citizen in a citizen’s action. *Id.* §§ 821C(2)(a), (c). A private entity has a right to recover damages where it can show that it suffered “harm of a kind different” from that suffered by other members of the general public. *Id.* § 821C(1). To demonstrate this special injury, it is not enough that the private entity has suffered the same kind of harm or interference, but to a greater extent or degree, than that suffered by the public at large. *Id.* § 821C cmt. b. “Difference in degree of interference cannot, however, be entirely disregarded in determining whether there has been difference in kind.” *Id.* § 821C cmt. c.

“Special injury” is illustrated in *Leo v. Gen. Elec. Co.*, 538 N.Y.S.2d 844 (App. Div. 1989), a case in which commercial fishermen brought a public nuisance claim against General Electric for its discharge of PCBs into the Hudson River. The fishermen asserted “special damages” from lost revenues and damage to their trade that resulted from the New York State Department of Conservation’s ban on the sale of striped bass caught in the Hudson River. *Leo*, 538 N.Y.S.2d 844, 845. The Court granted the commercial fishermen standing on the basis of their demonstration of harm peculiar to them that “went beyond the harm done to them

as members of the general community.” *Id.* at 849. Courts will not find a “special injury” where the plaintiff claims only to have suffered economic loss. *See, e.g., Allen v. Gen. Elec. Co.*, No. 03-711, slip op. 51345U (N.Y. Sup. Ct. Sept. 17, 2003).

#### D. Discussion

##### 1. Appellee Argument: The Clean Water Act Preempts the Federal Common Law of Nuisance

In the instant case, Appellants seek to bring a federal common law of nuisance claim against Appellee to abate the nuisance caused by the migration of PCBs to the Bearclaw River and the Noblesville public beach. However, the Clean Water Act preempts the federal common law of nuisance because it “occupies the field” of water pollution regulation. *See City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304 317-18 (1981). *See also Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 11 (1981). Any claim that the Appellants seek to bring against Appellee must be brought under the Clean Water Act, which has established an all-encompassing program of water pollution regulation. *Milwaukee II*, 451 U.S. at 310-11.

##### 2. Appellee Argument: The Clean Water Act Preempts a State’s Common Law of Nuisance in States Other Than the State in Which a Discharge Occurs

The Clean Water Act preempts state common law of nuisance in states other than the state in which a discharge occurs. This is so, because to apply the nuisance law of the affected state

would subject the point source to the threat of legal and equitable penalties if the [source State’s] permit standards were less stringent than those imposed by the affected State. Such penalties would compel the source to adopt different control standards and a different compliance schedule from those approved by the EPA .

*Int’l Paper Co. v. Oullette*, 479 U.S. 481, 495 (1987) (footnote omitted).

As a result, if Appellee’s contaminated soil is found to be a point source, then the Clean Water Act applies, and Appellants must bring any state common law of nuisance claims under the state law of Progress, not New Union. If, however, the soil is not a regulatory point source, then the Clean Water Act does not apply,

and Appellants may bring state nuisance claims against Appellee under the law of New Union.

3. Appellant-BRK and Appellant-Noblesville Argument: The Clean Water Act Does Not Preempt the Federal Common Law of Nuisance for Nonpoint Source Pollution

Appellee is incorrect in its assertion that the Clean Water Act preempts the federal common law of nuisance with regard to nonpoint source pollution. The Clean Water Act preempts federal common law of nuisance where the underlying claim is against a point source discharger. *Milwaukee II*, 451 U.S. at 317-18.

To determine whether a common law cause of action is preempted by federal legislation, the court must assess the scope of the legislation and determine whether the scheme established by Congress addresses the problem formerly governed by federal common law. *Milwaukee II*, 451 U.S. at 315 n.18. At federal common law, a nonpoint source polluter could be required to abate any nuisance arising from its activities. However, the Clean Water Act does not contain any enforcement mechanism by which the EPA can compel a nonpoint source polluter to reduce his impact on public health or the environment. CWA § 319, 33 U.S.C. § 1329 is not incorporated into the NPDES permitting program. As a result, nonpoint source pollution is not regulated by the Act and no federal legislation preempts the imposition of federal common law to abate it.

Therefore, the “scheme” created by Congress to address the problem of nonpoint source pollution does not address the problem formerly governed by the federal common law of nuisance. As a result, the Clean Water Act does not preempt the federal common law of nuisance for nonpoint source pollution.

4. Appellant-BRK and Appellant-Noblesville Argument: The Clean Water Act Does Not Preempt State Common Law of Nuisance for Nonpoint Source Pollution

Appellee asserts that the Clean Water Act preempts state common law of nuisance for nonpoint source pollution in states other than the state in which a discharge occurs. This contention would mean that the Act’s “savings clause” applies to only the common law of the discharging state. Appellee’s argument would preclude downstream states from suing polluters in upstream states, an outcome that is contrary to both the text of the statute and its judicial interpretation. This assertion is incorrect.

As is the case with federal common law, the Clean Water Act does not preempt state common law of nuisance for nonpoint source pollution, because, again, nonpoint source pollution is outside the purview of the Act. Further, the Clean Water Act contains two provisions that, together, create a "savings clause," which preserves "both a State's right to regulate its waters, . . . and an injured party's right to seek relief under 'any statute or common law.'" *Oullette*, 479 U.S. at 492 (quoting CWA § 505(c), 33 U.S.C. § 1365(e)). In the case of point source dischargers of pollution, which are regulated by the Clean Water Act, the appropriate state common law is that of the source state, rather than the common law of the affected state. *Id.* at 495.

In the case of nonpoint source dischargers of pollution, however, the downstream state should be able to apply its own common law of nuisance, because doing so does not interfere with any aspect of the Clean Water Act. As noted in the *Oullette* dissent, states have adopted two different conflict of law approaches to determine which state nuisance law should be applied. *Id.* at 503 n.1. The traditional rule is *lex loci delicti* and requires the application of the tort law of the jurisdiction where the injury occurred. *See* 16 Am. Jur. 2d *Conflict of Laws* § 145 (2005)). The rationale behind this rule is that because the affected state possesses a strong interest in redressing injuries to its citizens, its law should apply. The alternative rule employs an "interest-analysis" approach. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981). Under this analysis, if the primary purpose of the tort rule is to control the wrongdoer's conduct, then the source state's nuisance law may be applied. Alternatively, if the main purpose of the rule is to compensate those harmed by the wrongdoer's acts, the court may apply the affected state's public nuisance law. In the present case, this would mean that a party injured in New Union by Appellee's PCBs should be able to maintain a public nuisance claim against Appellee based either on New Union's common law, or that of Progress.

5. Appellee Argument: Appellant-BRK Does Not Have Standing to Bring a Public Nuisance Action Against Appellee Because It Cannot Demonstrate That Its Members Suffer "Special Injury"

Appellant-BRK is a private plaintiff and as such, lacks standing to bring a common law public nuisance suit on behalf of its members, whether under federal or state law because it cannot

demonstrate that its members suffer “special injury.” Appellant-BRK argues that the injury suffered by its members from Appellee’s alleged nuisance is the curtailment of the members’ recreation and fishing on the Bearclaw River. Recreation and fishing are rights common to the general public. Even if Appellant-BRK can demonstrate that injury to its members, an ethnic minority and economically-disadvantaged group, is more severe than that of the general public, that injury is not different in kind, but only different in degree from that suffered by the public at large. Thus, Appellant-BRK cannot demonstrate “special injury” to its members and, as a result, does not have standing to sue Appellee under a federal or state common law theory of nuisance.

6. Appellant-BRK Argument: Appellant-BRK Has Standing to Bring a Public Nuisance Action Against Appellee If It Can Demonstrate That Its Members Suffer “Special Injury”

In the preceding action, the Progress District Court held that Appellant-BRK could not bring a public nuisance claim against Appellee because the Clean Water Act had preempted such a claim under either federal or state law. The District Court also denied Appellant-BRK’s public nuisance claim because “its members do not suffer ‘special injury’” that the law requires a private party to demonstrate in order to establish standing to sue. The District Court found that the injury suffered by Appellant-BRK’s members was “exactly the same as the injury to public rights, namely, curtailment of recreation and fishing on the Bearclaw River.” Appellant-BRK contends on appeal that its members do suffer “special injury,” because, unlike the general public, they are an ethnic minority and an economically disadvantaged group. Many of Appellant-BRK’s members engage in sustenance fishing on the Bearclaw River. As a result, they are more vulnerable than the general public to exposure to PCBs in the soil, water, and fish.

In addition, Appellant-BRK may be able to show that its members have suffered more than just economic loss if it can demonstrate that, as a poor community, the Proto-Litigians are exposed to more PCBs, are less able to resist them, and have less access to health care than the general public. While PCBs may affect both the general public and the Proto-Litigians, the minority community’s subsistence fishing activities are more negatively impacted and the rate of their injury is qualitatively different than that of the general public. As a result, Appellant-BRK may



be able to demonstrate that it has standing to sue Appellee for public nuisance.

7. Appellant-Noblesville Argument: Appellant-Noblesville Is a Proper Plaintiff in Its Public Nuisance Action Against Appellee

In the court below, Appellant-Noblesville brought an action against Appellee for violating New Union's public nuisance law by polluting the Bearclaw River with its PCBs. Appellant-Noblesville argued that, as the local government, it was a proper plaintiff and that Appellee's PCBs constituted a public nuisance because they interfered with public rights to fish and recreate on the Bearclaw River. The District Court dismissed Appellant-Noblesville's public nuisance claims as preempted by the Clean Water Act.

As discussed above, the Clean Water Act does not preempt Appellant-Noblesville's public nuisance action against Appellee. Appellee's PCBs "prevent[ ] the use of a public bathing beach" or "deprive[ ] all members of the community of the right to fish" and, therefore, are a public nuisance." *Restatement (Second) of Torts* § 821B cmt. G (1979). As the local government, Appellant-Noblesville is the appropriate party to maintain a proceeding to abate the public nuisance caused by Appellee's PCBs. *See id.* § 821C(2)(b). Furthermore, in the preceding action, Appellee did not argue that Appellant-Noblesville was an improper plaintiff in its public nuisance action and, as a result, has waived its right to do so here.

COUNT VI:

The issues under this count include the following:

- Whether Appellant-BRK and Appellant-Noblesville Have Claims for Reimbursement and Summary Judgment Against Appellee Under CERCLA § 113(f), 42 U.S.C. § 9613(f), in the Absence of a Pending or Previous Action Under CERCLA § 107, 42 U.S.C. § 9607.
- Whether Appellant-BRK and Appellant-Noblesville Have Claims for Reimbursement and Summary Judgment Against Appellee Under CERCLA § 107, 42 U.S.C. § 9607, Where Appellant-Noblesville Is Also a Liable Party Under That Section.

### A. Facts

In the instant case, Appellant-BRK and Appellant-Noblesville seek reimbursement for funds they have expended to reduce the extent of exposure of Noblesville's residents to Appellee's PCBs on the public beach, in the Bearclaw River, and in the fish. Appellant-BRK spent \$500 on signs warning against the dangers of PCBs on the beach and in the river. Appellant-Noblesville spent \$50,000 to construct an eight-foot-high chain-link fence to prevent access to the public beach and to increase policing in the area to prevent swimming and fishing in the Bearclaw River. The court below dismissed both parties' claims, noting that a party may not bring an action for contribution under CERCLA § 113(f), 42 U.S.C. § 9613(f) (2000), without also bringing a costs recovery action under CERCLA § 106 or § 107(a), 42 U.S.C. § 9606 or § 9607(a). The lower court also found that, because Appellant-Noblesville is not an "innocent party," it may not maintain any type of CERCLA claim against Appellee.

### B. Positions of the Parties

Appellee argues that Appellant-BRK and Appellant-Noblesville cannot seek contribution from it under CERCLA § 113(f), 42 U.S.C. § 9613(f), in the absence of a previous or pending action under CERCLA § 107, 42 U.S.C. § 9607. Appellee further argues that Appellant-Noblesville may not recover any of its \$50,000 from it because Appellant-Noblesville is itself a PRP and, as a result, may not sue Appellee.

Appellant-BRK argues that Appellee is liable under CERCLA §§ 107 or 113, 42 U.S.C. §§ 9607, 9613, for the \$500 BRK spent on signs warning the public of the dangers presented by Appellee's PCBs on the beach and in the river.

Appellant-Noblesville argues that Appellee is liable under CERCLA §§ 107 or 113, 42 U.S.C. §§ 9607, 9613, for the \$50,000 that it spent on constructing the chain-link fence and increasing policing of the beach and the river.

### C. Law

#### 1. The Statute

Congress created CERCLA after it became clear that RCRA was inadequate to address sites already contaminated with hazardous waste. CERCLA gives the EPA power to respond to an actual or threatened release of a hazardous substance by cleaning

up the waste itself, then suing the statutorily defined PRPs for reimbursement of the response costs. CERCLA §§ 106, 107, 42 U.S.C. §§ 9606, 9607. It also permits private parties that incur response costs to seek reimbursement from PRPs. CERCLA, § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A). These private parties do not need to be "innocent parties," but can themselves be PRPs seeking reimbursement from other PRPs. See *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 (1994) (holding that CERCLA § 107 "unquestionably provides a cause of action for [PRPs] to seek recovery of cleanup costs").

CERCLA also provides private parties with a right to contribution in certain circumstances. CERCLA § 113(f), 42 U.S.C. § 9613(f). Contribution is a "right to demand that another who is jointly responsible for a third party's injury supply part of what is required to compensate the third party." *Black's Law Dictionary* 329 (7th ed. 1999). However, contribution is available only to those PRPs that have been sued under CERCLA §§ 106 or 107, 42 U.S.C. §§ 9606, 9607. See *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004).

CERCLA liability depends on proving four basic elements: (i) hazardous substances were disposed of at a facility; (ii) there has been a release or threatened release of a hazardous substance from the facility into the environment; (iii) the release or threatened release requires the expenditure of response costs; and (iv) the defendant is a PRP. CERCLA § 107(a), 42 U.S.C. § 9607(a). The PRPs are: (i) the facility's current owner or operator; (ii) the facility's owner or operator at the time of disposal of any hazardous substance; (iii) any person who arranged for the disposal, treatment, or transportation by another entity of hazardous substances ("arranger"); and (iv) any person who transported hazardous substances to facilities selected by another person ("transporter"). CERCLA § 107(a), 42 U.S.C. § 9607(a).

The Solid Waste Disposal Act, referred to in CERCLA § 101(29), 42 U.S.C. § 9601(29), defines "disposal" as the

discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

Solid Waste Disposal Act § 1004, 42 U.S.C. § 6903(3). Courts have distinguished between a CERCLA "disposal" and "release," noting

that the former requires some form of “active human intervention” in order for CERCLA liability to attach. *See, e.g., United States v. 150 Acres of Land*, 204 F.3d 698, 705-706 (6th Cir. 2000). Finally, the statute defines “facility” to mean “any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.” CERCLA § 101(9)(B), 42 U.S.C. § 9601(9)(B). A PRP can avoid liability only if he proves one of CERCLA’s narrowly defined defenses: that the release was caused by an act of God, an act of war, or the act or omission of a third party. CERCLA § 107(b), 42 U.S.C. § 9607(b).

CERCLA provides for the recovery of specified costs, as follows:

- (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
- (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
- (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
- (D) the costs of any health assessment or health effects study carried out [in accordance with the statute].

CERCLA § 107(a)(4)(A)-(D), 42 U.S.C. § 9607(a)(4)(A)-(D).

The National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”) was established to supplement CERCLA. The purpose of the NCP “is to provide the organizational structure and procedures for preparing for and responding to . . . releases of hazardous substances . . . .” 40 C.F.R. § 300.1 (2005). “The NCP provides . . . procedures for undertaking response actions pursuant to CERCLA . . . .” 40 C.F.R. § 300.3(b)(4). The regulations further provide as follows:

For the purpose of cost recovery under section 107(a)(4)(B) of CERCLA:

- (i) A private party response action will be considered ‘consistent with the NCP’ if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements in paragraphs (5) [e.g., documentation and evaluation of the cleanup activity] and (6) [e.g., opportunity for public comment on cleanup plan] of this section, and results in a CERCLA-quality cleanup . . . .

40 C.F.R. § 300.700(c)(3)(i).

## 2. Judicial Interpretation

In *Cooper Industries, Inc. v. Aviall Services, Inc.*, the Supreme Court recognized that CERCLA § 113(f), 42 U.S.C. § 9613(f), “allows persons who have undertaken efforts to clean up properties contaminated by hazardous substances to seek contribution from other parties liable under CERCLA.” *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 160 (2004). The Court emphasized that CERCLA § 113(f)(1), 42 U.S.C. § 9613(f), “specifies that a party may obtain contribution ‘during or following any civil action’ under CERCLA § 106 or § 107(a).” *Id.* However, before a party can seek contribution from a PRP under CERCLA § 113(f), 42 U.S.C. § 9613(f), it must first sue that PRP under either CERCLA § 106 or § 107(a), 42 U.S.C. §§ 9606, 9607(a):

The first sentence [of CERCLA § 113(f)], the enabling clause that establishes the right of contribution, provides: ‘Any person may seek contribution . . . during or following any civil action under section 9606 of this title or under section 9607(a) of this title.’ The natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely, ‘during or following’ a specified civil action.

*Id.* at 165-66 (citations omitted). Thus, a PRP cannot sue for contribution unless it has been sued itself.

## D. Discussion

1. Appellee Argument: Appellee Is Not Liable for Contribution Under CERCLA § 113(f), 42 U.S.C. § 9613(f), in the Absence of a Previous or Pending Action Under CERCLA § 107, 42 U.S.C. § 9607

Appellee is correct in its assertion that neither Appellant-BRK nor Appellant-Noblesville can bring a contribution claim against it in the absence of a previous or pending action under CERCLA § 107. This issue was addressed and decided by the Court in *Cooper Industries, Inc.*, 543 U.S. 157, 165. As a result, because neither Appellant-BRK nor Appellant-Noblesville have filed suit under CERCLA § 106 or § 107(a) against Appellee, they may not bring an action for contribution in this Court as against Appellee.

2. Appellant-BRK Argument: Appellee Is Liable for BRK's \$500 Response Costs Under CERCLA § 107, 42 U.S.C. § 9607

CERCLA § 107(a) would allow Appellant-BRK to bring a suit against Appellee if it were a PRP; i.e., if it owned land that had been contaminated by the PCBs and that contamination presented a threat to the public or the environment. However, Appellant-BRK is not a PRP in this case, because the only contaminated land at issue belongs either to Appellee or Appellant-Noblesville. As a result, this Court should find that Appellee is not liable to Appellant-BRK for its \$500 in signage expenses.

3. Appellant-Noblesville Argument: Appellee Is Liable to It for Its \$50,000 Response Costs Under CERCLA § 107, 42 U.S.C. § 9607

Unlike Appellant-BRK, Appellant-Noblesville owns property contaminated by Appellee's PCBs and should be able to bring suit under CERCLA § 107 against Appellee. CERCLA § 107(a) allows actions against the "owner or operator" of a "facility" where "hazardous substances" were "disposed" of when those hazardous substances are "released or threatened to be released" into the environment. Appellant-Noblesville owns or operates the public beach where the PCBs were disposed of after they were released into the environment through the actions of Appellee. As a PRP, Appellant-Noblesville can bring suit against Appellee for the reimbursement of its recovery costs. As the Court noted in *Cooper Industries, Inc.*, CERCLA § 107(a)(4)(B) "allows any person who has incurred costs for cleaning up a hazardous waste site to recover all or a portion of those costs from any other person liable under CERCLA." 543 U.S. 157, 172. Thus, this Court should find that Appellant-Noblesville can bring suit against Appellee for the recovery of its "necessary costs of response" that are "consistent with the national contingency plan."

The threshold question then becomes whether the \$50,000 expended by Appellant-Noblesville to construct an eight-foot-high chain-link fence and increase policing to keep residents off the PCB-contaminated beach are "consistent with the national contingency plan." CERCLA does not define the phrase "cost of response." The statute does, however, define "response" as "remove, removal, remedy, and remedial action; . . . all such terms . . . include enforcement activities related thereto." CERCLA § 101(25), 42 U.S.C. § 9601(25). CERCLA further defines "remove" and "re-

moval" in section 101(23), 42 U.S.C. § 9601(23), and "remedy" and "remedial" action in section 101(24), 42 U.S.C. § 9601(24). Thus, it appears that the costs of removal and remedial actions are costs of response.

If Appellant-Noblesville can demonstrate that its construction of the fence and increased policing were elements of a larger removal or remediation plan, it should be able to recover the \$50,000 it expended as long as the costs were consistent with the NCP. To be consistent with the NCP, Appellant-Noblesville's expenditures must be part of an overall response or remedy, which, "when evaluated as a whole, is in substantial compliance with" the documentation and evaluation requirements of CERCLA, provides opportunity for public comment on the cleanup, and "result[s] in a CERCLA-quality cleanup." See 40 C.F.R. § 300.700(c)(3). A court should find that Appellant-Noblesville's \$50,000 are recoverable if they were undertaken as part of a larger plan to remove or remediate the PCBs from the beach and the Bearclaw River. Appellee would then be able to avoid liability only he proves that the release of PCBs was caused by an act of God, an act of war, or the act or omission of a third party. CERCLA § 107(b), 42 U.S.C. § 9607(b). None of these narrowly defined defenses appear to be available to Appellee.